intrastate business.[9] Any attempt by a State to interfere with interstate commerce is void.[10] But where interstate commerce is not involved and the statute in controversy does not contain a prohibition the Prewitt case is the leading case.[11]

In the recent case of *Western Union Tel. Co.* v. *Frear,* 216 Fed. 199, a foreign corporation entered a State under the authority of a statute which provided that on the removal of a suit to the Federal courts its license to do business in that State would be revoked. The court, on the authority of *Barron* v. *Burnside,*[12] held the statute void as constituting in effect a prohibition. Inasmuch as this holding is contrary to the Prewitt case, the decision would seem erroneous.

LIQUIDATED DAMAGES AND PENALTIES.—Since 8 & 9 William III courts of law have applied the doctrine of equity in the construction of contracts containing penalties and forfeitures. On assuring themselves that the stipulations under consideration are penalties they have steadfastly refused to enforce them. Although the courts will not enforce a penalty, *eo nomine,* under certain rules to be discussed later they will enforce a stipulation for liquidated damages which, in reality, is sometimes hardly distinguishable from a penalty. The entire burden of judicial inquiry has been, therefore, centered upon whether the stipulations under consideration are penalties or liquidated damages. In the solution of this problem the courts have evolved certain guiding principles.

Where the parties, contemplating a breach of contract, the damages of which are difficult to ascertain, themselves calculate a reasonable amount as liquidated damages, the courts will uphold this amount as liquidated damages and not treat it as a penalty.[1] The parties are free to stipulate their own damages only so long as they remain reasonable and not exorbitant.[2] An essential element of liquidated damages is the intent of the parties. The damages specified must have been intended as liquidated damages [3] or the courts will hold it a penalty. This intent, however, is the legal intent obtained often by a forced construction, and frequently quite at variance with the real intent of the parties.[4] In their anxiety to relieve from the supposedly harsh measures of a penalty, the courts do not hesitate to exercise arbitrary methods of discovering the parties' in-

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[9] Western Union Tel. Co. *v.* Compton (Ark.), 169 S. W. 946.

[10] Western Union Tel. Co. *v.* Kansas, 216 U. S. 1; Herndon *v.* Chicago, etc., Ry. Co., 218 U. S. 135; Harrison *v.* St. Louis, etc., Ry. Co., 232 U. S. 318.

[11] Western Union Tel. Co. *v.* Compton, *supra;* Harrison *v.* St. Louis, etc., Ry. Co., *supra.*

[12] *Supra.*

[1] City of New Britain *v.* New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881.

[2] Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253.

[3] Stratton *v.* Fike, 166 Ala. 203, 51 South. 874.

[4] Davis *v.* U. S. 17 Ct. Cl. 201.

tention. As is pointed out by Deady, J., "The law is peculiar and instead of giving effect to the contract according to their intentions, it assumes to control them according to its standard of justice." [5] In a leading English case,[6] a sum of money settled upon by the parties as "liquidated and ascertained damages and not a penalty or penal sum, or in the nature thereof," was held by the court to be a penalty. It seems sheer nonsense to say this was the intention of the parties. Although in no wise bound by the express words of the contract,[7] its general form, nature and effect are considered in determining whether it stipulates for a penalty or liquidated damages.[8] There are frequently indirect or consequential damages known to the parties which may, by agreement, be inserted in the amount of stipulated damages of which it is proper for the court to take cognizance.[9]

When a larger sum secures the payment of a smaller one the larger sum is generally held a penalty and not enforceable.[10] Nor need the smaller sum be money, it may be the value of any collateral act.[11] Wherever the act to be secured is evidently a minor consequence compared with the sum placed upon its performance the courts are constrained to hold the larger sum a penalty.[12] Where it is obvious that the sum sought to be collected is merely *in terrorem*, to secure the performance of a collateral object, it has been held a penalty.[13] And likewise, where the actual damages are known or readily ascertainable and a much larger sum is stipulated for in the contract, the courts view this also as evidence of a penalty.[14]

Where the agreement contains provisions for the performance of several acts of varying degrees of importance and a sum is stipulated to be forfeited upon non-performance or violation of any one or all of such provisions, that sum is to be treated as a penalty and not as liquidated damages.[15] The reasoning of the courts in applying this rule is that in some cases the damages would be too small, in others too large, and that the parties can not be presumed to have agreed upon a fixed sum in either case.

The recent case of *Zenor* v. *Pryor* (Ind.), 106 N. E. 746, is directly in line with this principle. The appellee made a contract to purchase certain lands from the appellant paying therefor in equal installments. The contract further provided: "That if I fail to

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[5] Harris *v.* Miller, 6 Sawy. 519, 11 Fed. 118.
[6] Kemble *v.* Farren, 6 Bing. 141, 147.
[7] Whitfield *v.* Levy, 35 N. J. L. 149.
[8] Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158.
[9] Cotheal *v.* Talmage, 9 N. Y. 551, 61 Am. Dec. 716.
[10] See Chicago House Wrecking Co. *v.* United States (C. C. A.), 106 Fed. 385, 53 L. R. A. 122.
[11] Chicago, etc. *v.* U. S., *supra.*
[12] Chicago, etc. *v.* U. S., *supra.*
[13] Henry *v.* Davis, 123 Mass. 345.
[14] Doane *v.* Chicago City Ry. Co., 51 Ill. App. 353.
[15] Astley *v.* Weldon, 2 Bos. & P. 346; Boulware *v.* Crohn, 122 Mo App. 571, 99 S. W. 796.

pay for said lot as above specified I will forfeit as liquidated damages for such breach of this contract and default of such payment, an amount equal to the full purchase price as above stipulated." As the court pointed out, where there is nothing to show that the parties meant actually to adjust the damages and that it was evidently inserted as a collateral security for the main object, it is a penalty and hence not enforceable. Other evidences of the operation of this rule may be found in building contracts, where if a building is not completed within a certain fixed time, the contractor agrees to forfeit a stipulated sum. Applying the rule, such contracts are seen clearly not to be enforceable [16] because if the contractor merely does not finish the last coat of paint he forfeits the entire sum as surely as though he fails to lay the foundation. This of course is clearly a penalty. In case of doubt the courts are inclined towards construing such stipulations to be a penalty,[17] on the ground that no formal words should be allowed to cloak a penalty. As said by Lord Holt:[18] "Where a sum of money whether in the name of a penalty or otherwise is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of that object is considered as the principal intent of the deed or contract, and the penalty only as accessory and, therefore only to secure the damages really incurred."

The true test on reason and principle would seem to be: Does the stipulated sum represent compensation for actual loss; if so, it may be upheld as stipulated damages. The gradual trend of the courts is to apply the rule stated above.[19]

RELIEF FROM ILLEGAL CONTRACTS.—The general rule governing the courts in cases where relief from illegal contracts is sought is expressed by the maxims *in pari delicto portior est conditio defendentis,* and *dolo malo non oritur actio.*[1] This doctrine is deeply rooted in the law, although it is subject to certain limitations which have been recognized from the earliest times.[2] Its reason is founded solely on general principles of policy; the parties deserve no relief at the hands of the law because they have acted illegally and the discouragement of such practices in the future is purposed by ignoring such illegal claims. Lord Mansfield thus states the principle: "If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no

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[16] Chicago, etc. *v.* U. S., *supra.*
[17] Davis *v.* Gillett, 52 N. H. 126.
[18] Note to Barton *v.* Glover, Holt's N. P. Rep. 43.
[19] Lee, etc. *v.* Overstreet's Adm'r, 44 Ga. 508.
[1] Taylor *v.* Chester, L. R. 4 Q. B. (1869) 309; Chapman *v.* Haley, 117 Ky. 1004, 80 S. W. 190; Hutchins *v.* Weldin, 114 Ind. 80, 15 N. E. 804; Pullman Co. *v.* Central Trans. Co., 171 U. S. 138; Harriman *v.* Northern Securities Co., 197 U. S. 244.
[2] Everett *v.* Williams, 9 L. Quar. Rev. 197.